Supreme Court, U.S.
FILED
OCT 19 2000
CLERK

(2)

No. 00-489

In The

Supreme Court of the United States

ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health, and RICHARD F. SCHAUSEIL, as Director of the Monroe County Department of Social Services,

Petitioners,

v.

NOVA H. ROBBINS, on her own behalf and as Attorney-in-Fact for ROBERT H. ROBBINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Rene H. Reixach, Jr.
Counsel of Record
WOODS, OVIATT GILMAN LLP
700 Crossroads Building
Rochester, New York 14614
(716) 987-2800

Attorneys for Respondents

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(3967)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

13pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Cited Authorities ii

Reasons for Denying the Writ 1

I. There is no conflict of authority among the circuit courts of appeal 1

II. The decision below is consistent with prior rulings by this Court 5

III. If the conditional cross-petition is not granted, there is no longer any justiciable case and controversy 6

Conclusion 8

TABLE OF CITED AUTHORITIES

Page

Cases:

Bennett v. Arkansas, 485 U.S. 395 (1988) 5

Bradley v. Austin, 841 F.2d 1288 (6th Cir. 1988) 2

Goldberg v. Kelly, 397 U.S. 254 (1970) 4

Gorrie v. Bowen, 809 F.2d 508 (8th Cir. 1987) 2

Norman v. St. Clair, 610 F.2d 1228 (5th Cir. 1980) 2

Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973) 5

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 5

United States Constitution:

Article III 6

Statutes:

26 U.S.C. § 6334(c) 3

42 U.S.C. § 405(j) 2

42 U.S.C. § 407 ..... *passim*

42 U.S.C. § 407(a) 1, 2

42 U.S.C. § 407(b) 1, 2

42 U.S.C. § 602(a)(38) 2

42 U.S.C. § 659(a) 3

42 U.S.C. § 1396r-5 1

42 U.S.C. § 1396r-5(e)(2) 4

42 U.S.C. § 1396r-5(e)(2)(A)(i) 4

42 U.S.C. § 1396r-5(e)(2)(B) 4-5

42 U.S.C. § 1396a(a)(3) 4

42 U.S.C. § 1396a(a)(10)(C)(i)(III) 3

42 U.S.C. § 1396a(f) 2, 3

42 U.S.C. § 1983 5

Pub. L. No. 98-21, 97 Stat. 130 (1983) 2

Pub. L. No. 104-193, 110 Stat. 2105 (1996) 2

N.Y. Social Services Law § 22 (McKinney 1992) 4

N.Y. Social Services Law § 366-c(8) (McKinney 1992) 4

N.Y. State Administrative Procedure Act §§ 301 *et seq.* (McKinney 1995) 4

Regulations:

42 C.F.R. §§ 431.200 *et seq.* (1999).....4

18 N.Y.C.R.R. §§ 358-1.1 *et seq.* (1999).....4

Other Authorities:

N.Y.S. Dept. of Social Services Administrative Directive 89 ADM-47.....3

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT OF AUTHORITY AMONG THE CIRCUIT COURTS OF APPEAL

The decision below does not conflict with the decisions of any other circuit courts of appeal for two reasons.[1]

First, 42 U.S.C. § 407(b) requires an explicit statutory cross-reference to override the anti-alienation protections for Social Security benefits under 42 U.S.C. § 407(a). In this case, there is no question that the medical assistance ("Medicaid") statute, 42 U.S.C. § 1396r-5, makes no reference whatsoever to either Social Security benefits or their protection under section 407. The more recent cases relied on by petitioners concerned a provision of the former Aid to Families with Dependent Children ("AFDC") program which explicitly overrode related statutory protections for Social Security benefits, and that would have been meaningless if section 407 had not at least implicitly been overridden as well. The older case relied on by petitioners predated the enactment of section 407(b), and it concerned a Medicaid program operating under very different rules than New York's, so it is not in direct conflict with the decision below either.

---

[1] While petitioners have cited a number of other cases and materials concerning whether an "income first" policy like that in question violates the federal spousal impoverishment statute, 42 U.S.C. § 1396r-5 (Pet. 6, nn. 3 & 4), none of those cases considered the question here of whether such a policy violates the anti-alienation statute, 42 U.S.C. § 407(a).

42 U.S.C. § 407(b) was enacted effective April 20, 1983 by § 335(a) of Pub. L. No. 98-21, 97 Stat. 130 (1983). It provides that "No other provision of law, enacted before, on, or after the date of the enactment of this section, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section." In the cases relied on by petitioners from other circuit courts of appeal decided after the enactment of section 407(b), *Bradley v. Austin*, 841 F.2d 1288 (6th Cir. 1988), and *Gorrie v. Bowen*, 809 F.2d 508 (8th Cir. 1987), the issue was whether the mandatory counting of Social Security benefits of other family members in computing eligibility under the since repealed AFDC program violated section 407(a).

There, the AFDC statute, 42 U.S.C. § 602(a)(38) [terminated by Pub. L. No. 104-193, 110 Stat. 2105 (1996)], contained an explicit override of the protections of 42 U.S.C. § 405(j), which requires a representative payee to use Social Security benefits solely for the beneficiary. That provision would have been rendered ineffective, and would have made no sense, had those Social Security benefits nonetheless still been protected by section 407. While that was perhaps an implicit cross-reference to section 407, in this case there is no cross-reference at all, either implicit or explicit.

The other case relied on by petitioners, *Norman v. St. Clair*, 610 F.2d 1228, 1243 (5th Cir. 1980), pre-dates the 1983 enactment of section 407(b), so the limitations in that statute were obviously not considered by that court. Moreover, in *Norman*, the court held that the Medicaid statute applicable to the program in Mississippi, 42 U.S.C. §

1396a(f), required that state to count income that would have been counted by the Supplemental Security Income (SSI) program, including Social Security benefits. *Id.* In New York, by contrast, the applicable Medicaid statute, 42 U.S.C. § 1396a(a)(10)(C)(i)(III), permits methodologies for determining income eligibility which are more generous than under SSI.

Congress is well aware of the limitations of section 407, and when it has chosen to override them, it has done so explicitly. *See, e.g.*, 42 U.S.C. § 659(a)(concerning spousal support); 26 U.S.C. § 6334(c)(concerning levies by the Internal Revenue Service). Had Congress wished to afford state Medicaid programs an override of section 407 similar to that it afforded for support and for the IRS, it surely knew how to do so, and this Court is not the proper forum to rewrite the Medicaid statute to suit the State.

The second reason why the decision below does not conflict with the decisions of any other circuit courts of appeal is that, unlike all the other cases relied upon by petitioners for their conflict theory, this case involves the mandatory[2] re-

[2] While petitioners assert that this re-allocation is voluntary, "Robert is permitted – but not required" to transfer his income to Nova as part of the process for increasing the CSRA at a Fair Hearing (Pet., 9), the formal policy of New York requires such re-allocation. N.Y.S. Dept. of Social Services Administrative Directive 89 ADM-47, § IV(d)(i), p. 23, states the policy (administration of Medicaid in New York having subsequently been transferred to the Department of Health): "In the event that the institutionalized spouse does not make available the community spouse monthly income allowance . . ., an additional resource allowance cannot be established." The brief of the State Health Commissioner in the Second Circuit stated: "If the couple's

allocation of Social Security benefits in an administrative Fair Hearing. This is not just some ministerial budgeting function performed by a front-line welfare department examiner as in all the other cases relied upon by petitioners, but truly is "other legal process" within the meaning of section 407. For that reason, also, the assertion at pp. 17-18 of the Petition, that the decision below could affect other benefit programs, is incorrect. This Fair Hearing procedure to increase allowable resources is unique to the small fraction of Medicaid cases involving institutionalized spouses.

A Fair Hearing is a hearing on the record, subject to a panoply of statutory and regulatory requirements. 42 U.S.C. §§ 1396a(a)(3), 1396r-5(e)(2); N.Y. Social Services Law §§ 22, 366-c(8) (McKinney 1992); 42 C.F.R. §§ 431.200 *et seq.* (1999); 18 N.Y.C.R.R. §§ 358-1.1 *et seq.* (1999). In cases involving the discontinuation or reduction of benefits, it is required as a matter of due process. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In New York, it is subject to the requirements for adjudicatory proceedings under the N.Y. State Administrative Procedure Act §§ 301 *et seq.* (McKinney 1995).

Fair hearings are sufficient "legal process" in that they are an alternative to court proceedings where a spouse living in the community seeks support from the spouse in an institution who is receiving Medicaid. 42 U.S.C. §§ 1396r-5(e)(2)(A)(i),

---

combined income equals or exceeds the community spouse's monthly need, a higher resource allowance is not established, regardless of whether the institutionalized spouse actually transfers income to the community spouse." (p. 16).

1396r-5(e)(2)(B). Most significantly, the fact finding in an administrative fair hearing is a sufficiently formal legal process to be binding under collateral estoppel principles, even in an independent federal court action under 42 U.S.C. § 1983. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

Thus, the re-allocation of Social Security benefits in a Fair Hearing is the result of "other legal process," even if the more routine ministerial budgeting in the cases cited by the petitioners is not.

II. THE DECISION BELOW IS CONSISTENT WITH PRIOR RULINGS BY THIS COURT

The petition raises no important question of federal law and makes no showing that the decision below conflicts with relevant decisions of this Court. To the contrary, the decision below is consistent with the well-understood limitations imposed by section 407 and the two prior decisions of this Court construing it.

This Court first considered section 407 in *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). There, the statute was described as being "all-inclusive." *Id.* at 415. In the face of a claim similar to that raised by petitioner here, this Court held that section 407 was a "broad bar," contained no implied exception for public benefit programs and did not permit a State Welfare agency to place itself "in a preferred position as compared with any other creditor," *Id.* at 416. Subsequently in *Bennett v. Arkansas*, 485 U.S. 395 (1988), this Court rejected a similar effort to make Social

Security benefits subject to taking by a State prison system.

Nothing in the decision below conflicts with those decisions, and petitioners have not demonstrated that this case raises any important new issues on this subject.

III. IF THE CONDITIONAL CROSS-PETITION IS NOT GRANTED, THERE IS NO LONGER ANY JUSTICIABLE CASE AND CONTROVERSY

On the facts of this case, unless the conditional cross-petition being filed herewith, *Robbins v. Novello*, No. 00-_____, is granted, there will no longer be a case and controversy justiciable in this court under Article III of the Constitution.

Nova was allowed $2,019 of monthly income and had $882.51 of income in her name, leaving a monthly shortfall of $1,136.49 (Pet., App. A, 5a). Robert's pension was $1,870.28 per month (Pet., App. A, 5a), and the courts below held that the mandatory re-allocation of his pension to Nova did not violate ERISA (Pet., App. A, 15a, 25a). The conditional cross-petition in *Robbins v. Novello*, No. 00-_____, seeks review of that issue of whether New York's mandatory re-allocation policy violates ERISA.

If the conditional cross-petition is not granted, so that the rulings below that the mandatory re-allocation of Robert's pension is lawful under ERISA become final, then there no longer will be any case and controversy on the issue

under the Social Security Act raised by petitioners. If Robert's pension income of $1,870.28 per month is added to Nova's own income of $882.51 per month, the $2,752.79 total is more than the $2,019 monthly income allowance for Nova. Thus, if the law of the case is that Robert's pension income lawfully was re-allocated to Nova, then the Medicaid program would have no need to re-allocate Robert's Social Security benefits.

How the New York Medicaid program would have treated Robert's Social Security benefits would then only be an issue if his pension had been at least $733.80 less per month. Thus, absent review of the ERISA issue on the conditional cross-petition, the Social Security issue raised by petitioners will become an abstract and purely hypothetical question between the parties.[3]

[3] The converse is not true, and if both this petition and the conditional cross-petition were granted, there would be a live case and controversy as to both issues. If Robert's Social Security benefits of $992.80 per month (Pet., App. A, 5a) were added to Nova's $882.51 of monthly income, she would still be below the $2,019 monthly income allowance, so there would still be a case and controversy about whether any of Robert's pension benefits mandatorily could be re-allocated to make up the difference.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RENÉ H. REIXACH, JR.
Counsel of Record
WOODS OVIATT GILMAN LLP
700 Crossroads Building
Rochester, New York 14614
(716) 987-2800

Attorneys for Respondents